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No. 412

In the Supreme Court of the United States

OCTOBER TERM, 1963

DOMINICK S. FAGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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709-523—63



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OPINION BELOW

The district court wrote no opinion. The opinion of the court of appeals (Pet. 1a-3a)[1] is reported at 319 F. 2d 791.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1963. On July 25, 1963, an order was signed by Mr. Justice Harlan extending the time to file a petition for a writ of certiorari to August 26, 1963. The petition was filed in this Court on August

[1] "Pet." refers to the petition for certiorari. "R." refers to petitioner's appendix in the court of appeals. "Supp. R." refers to the government's appendix in that court.

27, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court committed reversible error during petitioner's trial for tax evasion when it allowed certain corporate records into evidence without determining whether their disclosure to federal agents by a State district attorney had violated the State's rules regarding the secrecy of grand jury proceedings.

STATUTE INVOLVED

Code of Criminal Procedure, 66 McKinney's Consolidated Laws of New York Annotated (Part 3):

§ 952-t. *Stenographers' duties*

It shall be lawful for any stenographer duly appointed and qualified as hereinbefore provided, to attend and be present at the session of every grand jury impaneled in the county in which he is appointed, and it shall be his duty to take in shorthand or upon a typewriting machine the testimony introduced before such grand juries, and, except when his original notes and minutes and the exhibits pertaining thereto have been impounded as hereinafter provided for, to furnish to the district attorney of such county a full copy of all such testimony as such district attorney shall require, but he shall not permit any other person to take a copy of the same, nor of any portion thereof, nor to read the same, or any portion thereof, except upon the written order of the court duly made after hearing the said district attorney provided, however, that the judge presiding over the term of court for which any grand jury is

drawn, may at any time during the sitting of such grand jury and upon petition signed by its foreman or acting foreman and certified by its clerk to have been authorized by twelve or more of the grand jurors constituting such grand jury, impound the stenographer's original notes and minutes and the exhibits pertaining thereto, or any portion of such original notes, minutes, and exhibits, and may order them to be delivered to him and placed in his custody or in the custody of a public officer named by him. When so impounded, such original notes, minutes, and exhibits shall not be taken from the custody of such judge or such public officer except upon the order of such judge, who, upon the written requisition of the foreman or acting foreman of such grand jury, shall deliver them or order them to be delivered to such foreman or action [*sic*] foreman for use in the grand jury room during the hours when the grand jury is actually in session. Except as above provided, all of the said original notes and minutes shall be kept in custody of said district attorney, and neither the same nor a copy of the same, or any portion of the same, shall be taken from the office of said district attorney, excepting as above provided. Nothing contained in this section, however, shall be construed to prohibit a grand jury from inspecting its own minutes and exhibits while in session. Added L. 1909, c. 66, § 4; amended L. 1941, c. 914, § 1, eff. Sept. 1, 1941.

STATEMENT

After trial by jury in the United States District Court for the Western District of New York, peti-

tioner was convicted of filing false and fraudulent individual income tax returns for 1954 and 1955, and, as principal officer of two corporations, of failing to file six withholding tax returns due in 1955 and 1956 (26 U.S.C. 7201, 7203) (R. 3–4). The court of appeals unanimously affirmed his conviction (Pet. 1a–3a).

In this Court petitioner does not challenge the sufficiency of the evidence to sustain his conviction. Concisely stated, the evidence introduced at the trial demonstrated that petitioner had diverted funds to his personal use from the three wholly-owned corporations, and that those receipts were not reflected on his individual income-tax returns. It also showed that employees' income taxes were withheld by two of these corporations, but that the corporations filed no withholding tax returns for the years in question (Supp. R. 90–99).

Petitioner's sole contention in this Court relates to the admission into evidence of the three corporations' payroll records, cash receipts and disbursements journals, accountants' work papers, and computations of wages, social security and withholding taxes.[2] The facts relating to the means whereby these documents were obtained were brought out in the course of a hearing on petitioner's motion to suppress their use as evidence (R. 15–21), and they may be briefly summarized:

In the fall of 1955, the district attorney of Erie County, New York, began a grand jury investigation

[2] A list of the exhibits which are the subject of this contention appears at Supp. R. II–IV.

into alleged corruption among public officials in the City of Lackawanna (Supp. R. 7–8). One of the subjects under investigation was a road-paving contract which involved the three corporations owned by petitioner. The district attorney had reason to believe that bribe payments to public officials had been made from the amounts owing under the paving contract (Supp. R. 11). Subpoenas duces tecum were thereupon issued to petitioner and to his attorney, requiring them to produce the books and records of these corporations for inspection by the State grand jury (Supp. R. 11–12). Petitioner was also subpoenaed to testify before the grand jury. When he invoked the privilege against self-incrimination during his personal appearance, he was granted immunity from prosecution (New York Penal Law § 2447) and compelled to testify.

On or about May 22, 1956—after the State grand jury had subpoenaed the records of petitioner's corporations—August Kirchner, an Internal Revenue agent, was assigned to investigate the tax liabilities of one Thomas Panasci (Supp. R. 16–17). Agent Kirchner learned from Panasci's wife that Panasci had been employed by petitioner's corporations (Supp. R. 19), and he was informed by newspaper publicity that the State grand jury had subpoenaed the books and records of certain of these corporations (Supp. R. 18). An assistant district attorney who was assigned to the grand jury investigation was granted permission, upon request, to examine Panasci's books and records while they were in the custody of Agent Kirchner (Supp. R. 17). This ex-

amination took place in September and October 1956 (Supp. R. 23).

On September 25, 1956, the State district attorney issued additional subpoenas duces tecum to petitioner and to his attorney, requiring them to produce certain checks issued by petitioner's wholly owned corporations (Pet. 5). Approximately one month thereafter, on October 29, 1956, Agent Kirchner subpoenaed, under 26 U.S.C. 7602, the corporate records which were in the possession of the State grand jury pursuant to his assigned duty to investigate unreported income received by Panasci (Supp. R. 22, 23). The records were examined by Agent Kirchner at the district attorney's office on several occasions between November 26 and December 4, 1956, and they were subsequently delivered to Kirchner for photostating on March 18, 1957 (Supp. R. 23). None of petitioner's personal records were examined or copied by Agent Kirchner, nor did he have access to petitioner's testimony before the State grand jury (Supp. R. 2). Throughout his entire investigation Agent Kirchner was assigned solely to investigate Panasci's tax liabilities and he was never involved with petitioner's case (Supp. R. 26). In the course of this investigation he did not request the State district attorney to issue any subpoenas or solicit any other assistance (Supp. R. 2, 26).

The Internal Revenue agent who conducted the investigations which produced the charges against petitioner testified that they were assigned to these duties on December 6, 1956 (the corporate withholding tax investigation) (Supp. R. 26), and on March

28, 1958 (petitioner's personal tax liability investigation) (Supp. R. 6). Neither had any contact with the office of the Erie County district attorney when the corporate records were secured in 1956 (Supp. R. 6, 28). The agent in charge of the withholding tax investigation secured copies of the corporate records from Agent Kirchner after he was unable to obtain the records from the corporations or from petitioner (Supp. R. 30).

Petitioner filed a pre-trial motion to suppress testimony and records allegedly illegally obtained by federal agents from the district attorney of Erie County, claiming a violation of his rights under the Fourth and Fifth Amendments, and of the immunity granted him in connection with his testimony before the State grand jury (R. 13-23). The district court found that only corporate records had been obtained from the State district attorney, and denied the motion (Pet. 8). The court of appeals, noting that "the records came into the possession of the New York authorities for a purpose wholly unrelated to the subsequently initiated federal inquiry," also rejected petitioner's constitutional claim on the ground that the corporate records were beyond the protection of petitioner's privilege against self-incrimination (Pet. 1a-3a).

ARGUMENT

In the district court and in the court of appeals petitioner contended that federal and state authorities had collaborated to deprive him of his constitutional privilege against self-incrimination, and that the exhibits introduced at his trial were fruits of this im-

permissible co-operation. In this Court petitioner has abandoned his constitutional claim and has advanced, for the first time, the argument that the admission of the corporate records into evidence was erroneous—albeit not unconstitutional—because the records were secured by federal agents in violation of a New York statute imposing secrecy on grand jury proceedings. Neither the sole question presented by the petition nor the contention rejected by the courts below requires consideration by this Court.

1. Petitioner's failure to assert his novel argument in the courts below is, in the absence of "exceptional circumstances," fatal to its initial presentation here. *E.g., Lawn* v. *United States*, 355 U.S. 339, 362 n. 16; *Husty* v. *United States*, 282 U.S. 694, 701–702. Petitioner's motion to suppress made no mention of § 952–t of the New York Code of Criminal Procedure. Nor was this provision, or any other New York statute, relied upon or cited in petitioner's brief in the court of appeals. Failure to raise and preserve the issue is not explained in the petition for certiorari by any circumstance, exceptional or otherwise.

2. Moreover, there is no evidence in the record supporting petitioner's speculative assumption that the Erie County district attorney failed to obtain the permission of a state court before revealing the corporate records to Agent Kirchner pursuant to the agent's subpoena. Although the incumbent district attorney (who had been the First Assistant in 1956) testified in detail as petitioner's witness during the hearing on the motion to suppress, he was never

asked whether permission of a state court had been sought before the records were disclosed.

3. Assuming, *arguendo*, that no permission to disclose was obtained from a New York court, petitioner's contention nonetheless fails for other reasons: (1) It is not at all clear from the language and purpose of § 952-t that it would prohibit disclosure of unimpounded grand jury exhibits for purposes other than discovery of matters occurring before the grand jury. On its face, the first part of the New York statute (pp. 2–3, *supra*)—which applies unless the grand jury records are "impounded"—prohibits disclosure of testimony only. And if the State's secrecy policy is similar to that of the federal courts, documents subpoenaed by a grand jury may be disclosed for their "intrinsic value in the furtherance of a lawful investigation," although not "to learn what took place before the grand jury." *United States* v. *Interstate Dress Carriers, Inc.*, 280 F. 2d 52, 54 (C.A. 2). The purpose of the disclosure in the present case was obviously unrelated to the matters pending before the State grand jury. (2) The illegality, if there was any, is not attributable to federal officials. Whatever duty the statute imposes is cast upon the grand jury stenographer and on the district attorney. Those who seek disclosure are surely not required by the New York statute or by any federal policy to police the conduct of State officials in order to insure that they comply with all the statutory formalities. Since there was no prearranged scheme to circumvent the statute, there is no reason to penalize federal officials for the technical

omissions of the State district attorney. (3) The illegality, if there was any, did not prejudice petitioner. Had the district attorney applied to a State court for an order authorizing disclosure of the grand jury exhibits, permission would have been granted. *In re Attorney General of the United States*, 160 Misc. 533, 291 N.Y.S. 5.

4. Finally, there is no merit to petitioner's basic contention that the admissibility of evidence in the federal courts depends on whether it was secured free of any taint of illegality under local law. Such a novel doctrine would subject the rules of evidence in federal trials to the diverse technical requirements produced by local conditions. This Court's supervisory power over the administration of criminal justice in the federal courts requires it to impose exclusionary rules in order to promote compliance with federal statutes or rules of procedure. The same policy may even sustain the exclusion of evidence obtained by federal officials through inherently immoral or lawless conduct. But a technical violation of State law, such as that which may have occurred in the present case, calls for no such extreme sanction.

5. The court of appeals correctly rejected the claim which petitioner has now abandoned—that federal and state officials collaborated to deprive him of his privilege against self-incrimination. Only corporate records were obtained from the State district attorney. These had been subpoenaed and produced without any promise of immunity since they were not within the scope of the privilege against self-incrimination. As the court of appeals observed, they were documents of

a sort which petitioner "could himself have been compelled to produce" (Pet. 2a). *Wilson* v. *United States*, 221 U.S. 361, 385; *United States* v. *Guterma*, 272 F. 2d 344, 346 (C.A. 2); see *United States* v. *White*, 322 U.S. 694, 699. Consequently, there is no basis for contending that their use at petitioner's trial infringed on any constitutionally protected right.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted

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